Fima Logistics Sdn Bhd & Anor v Perniagaan Sin-Kung Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORGINATING SUMMONS NO S2–24–1237 OF 1998
KAMALANATHAN RATNAM J
9 JUNE 1999

Moneylenders *— Unlicensed moneylender — Whether plaintiff contravenes Moneylenders Act 1951 — Whether plaintiff constitutes a money lender — Test applicable — No continuity of similar loans — Whether loan was incidental part of his business*

The first plaintiff had entered into a sale and purchase transaction to purchase a total of 70% of the shares in the defendant and had paid a deposit of RM9.5m to purchase the shares. Thereafter, an agreement to grant a short term loan ('Loan I') was entered between the first plaintiff and the defendant to assist the defendant to acquire a semi-detached double storey factory unit in Seberang Prai ('the Seberang Perai property'). Subsequently, another similiar loan ('Loan II') was granted to the defendant to assist the defendant to acquire two acres of industrial land with two built-up warehouses in Sungai Petani ('the Sungai Petani properties'). Both agreements provide that the defendant will pledge the titles to the Seberang Perai and Sungai Petani properties to the first and second plaintiffs respectively. The defendant failed to do so.

The plaintiffs applied for an order that the defendant do deliver the original issue documents of title relating to the Seberang Perai and Sungai Petani properties to the first plaintiff or alternatively for an order that if both the properties have not been registered in the name of the defendant, the documents of title relating to the properties together with other documents duly signed and which are necessary to effect the transfer of the properties, be delivered to the first or the second plaintiffs. The defendant argued that: (i) the first plaintiff has granted three loans (including Loan I and Loan II) which contravene the Moneylenders Act 1951 ('the Act') and thus unenforceable; and (ii) the defendant is not in possession of the issue documents of title to the Sungai Petani properties and accordingly is not in a position to deliver up the same to the plaintiffs.

Held:

(1) The first plaintiff has held itself out to be an investment holding company. This by itself does not make the first plaintiff a moneylender. The first plaintiff had never given any loans to anybody else except the defendant and all the three loans given were for similar purposes and within a close proximity of time, within a ten-month period. There is no question of any continuity or system or repetition of similar loans to any other person that can lead to the conclusion that the first plaintiff is in the moneylending business (see p 40D–F).

(2) The first plaintiff had committed itself to purchase an interest in the defendant and that it is not at all unreasonable for the plaintiffs to ensure the financial well-being of the defendant. The three loans were merely incidental to the sale and purchase transaction of the shares in the defendant by the first plaintiff (see p 40H–I); *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9 followed.

(3) As the defendant is not in possession of the issue document of title to the Sungai Petani lands, the defendant is in no position to deliver up the same to the plaintiffs. Moreover, the plaintiffs have withdrawn their claim for delivery of the original issue document of title to the Sungai Petani lands.

As the plaintiffs had made a land search over the Seberang Perai property and had ascertained that the property is still in the name of the developer and that it has yet to be transferred into the name of the defendant, the plaintiffs are only confining their claim to the alternative prayer and only in respect of the Seberang Perai property. Thus, the court grants the alternative prayer of the plaintiffs in respect of only the Seberang Perai property (see p 41A–C).

[Bahasa Malaysia summary

Plaintif pertama telah memasuki suatu transaksi jual beli untuk membeli sejumlah 70% saham-saham defendan dan telah membayar wang pendahuluan sebanyak RM9.5 juta untuk membeli saham-saham tersebut. Selepas itu, suatu perjanjian untuk memberikan pinjaman jangka pendek ('Pinjaman I') telah dimasuki antara plaintif pertama dan defendan bagi membantu defendan memperolehi sebuah unit kilang berkembar dua tingkat di Seberang Prai ('harta Seberang Prai tersebut'). Selepas itu, suatu pinjaman lain yang sama ('Pinjaman II') telah diberikan kepada defendan bagi membantu defendan memperolehi dua ekar tanah perindustrian dengan dua gudang yang telah dibina di Sungai Petani ('harta-harta di Sungai Petani'). Kedua-dua perjanjian memperuntukkan bahawa defendan akan mencagarkan hakmilik harta-harta Seberang Prai dan Sungai Petani masing-masing kepada plaintif pertama dan kedua. Defendan telah gagal untuk berbuat demikian.

Plaintif-plaintif telah memohon suatu perintah supaya defendan menyerahkan dokumen hakmilik keluaran asal berhubung dengan harta-harta Seberang Prai dan Sungai Petani kepada plaintif pertama atau sebagai alternatif untuk suatu perintah bahawa, jika kedua-dua harta-harta tersebut tidak didaftarkan di bawah nama defendan, dokumen-dokumen hakmilik tersebut berhubung dengan harta-harta tersebut dengan dokumen-dokumen lain yang ditandatangani dan yang perlu untuk mengakibatkan pemindahan harta-harta tersebut, diserahkan kepada plaintif-plaintif pertama dan kedua. Defendan telah mengemukakan alasan bahawa: (i) plaintif pertama telah

memberikan tiga pinjaman (termasuklah Pinjaman I dan Pinjaman II) yang bertentangan dengan Akta Peminjam Wang 1951 ('Akta tersebut') dan oleh itu adalah tidak boleh dikuatkuasakan; dan (ii) defendan tidak memiliki dokumen hakmilik keluaran harta-harta Sungai Petani dan sewajarnya tidak mempunyai kedudukan untuk menyerahkan yang sama kepada plaintif-plaintif tersebut.

Diputuskan:

(1) Plaintif pertama telah menganggap dirinya sebagai sebuah syarikat pemegang saham. Ini sahaja tidak menjadikan plaintif pertama sebagai pemberi pinjam wang. Palintif pertama tidak pernah memberi apa-apa pinjaman kepada sesiapa selain defendan dan semua ketiga-tiga pinjaman telah diberi bagi tujuan yang sama dan di dalam tempoh masa yang dekat, di dalam tempoh sepuluh bulan. Tiada persoalan untuk apa-apa kesinambungan atau sistem atau keberulangan pinjaman-pinjaman yang sama kepada mana-mana orang lain yang boleh membawa kepada kesimpulan bahawa plaintif pertama terlibat di dalam perniagaan pemberi pinjam wang (lihat ms 40D–F).

(2) Plaintif pertama telah menyatakan kesanggupan untuk memperolehi kepentingan di dalam defendan dan adalah tidak munasabah sama sekali bagi plaintif-plaintif memastikan kesejahteraan kewangan defendan. Ketiga-tiga pinjaman tersebut hanyalah sampingan kepada transaksi jual beli saham-saham di dalam defendan oleh plaintif pertama (lihat ms 40H–I); *Ng Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9 diikut.

(3) Memandangkan defendan tidak memiliki dokumen hakmilik keluaran tanah-tanah Sungai Petani itu, defendan bukan di dalam kedudukan untuk menyerahkan yang sama kepada plaintif-plaintif. Lebih-lebih lagi, plaintif-plaintif telah menarik balik tuntutan mereka terhadap penyerahan dokumen hakmilik keluaran asal tanah-tanah Sungai Petani itu.

Memandangkan plaintif-plaintif telah membuat carian tanah ke atas harta Seberang Prai dan telah memastikan bahawa harta tersebut masih atas nama pemaju dan bahawa ia masih belum dipindahmilikkan kepada nama defendan, plaintif-plaintif hanya membataskan tuntutan mereka kepada permohonan alternatif dan hanya berkenaan dengan harta Seberang Prai. Oleh demikian, mahkamah membenarkan permohonan alternatif plaintif-plaintif berkenaan dengan harta Seberang Prai sahaja (lihat ms 41A–C).]

Notes

For cases on unlicensed moneylenders, see 10 *Mallal's Digests* (4th Ed, 1996 Reissue) paras 529–532.

Cases referred to

Chow Yoong Hong v Choong Fah Rubber Manufactory [1962] MLJ 74 (refd)

Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9 (folld)

Legislation referred to

Moneylenders Act 1951 ss 2, 3

SS Ling (*Lee Perara & Tan*) for the plaintiffs.

Charmaine Chow (*Sivananthan*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The facts leading to the application are as follows:

On 27 January 1997, the first plaintiff entered into a sale of shares agreement ('the agreement') with the owners of the defendant to purchase 70% of the total issued and paid-up capital of the defendant ('the sale of shares'). Clause 2.2 of the agreement states that the total purchase consideration for the sale of shares was RM15,750,000 of which a total of RM9.5m was paid by the first plaintiff to the said owners of the defendant.

The agreement was conditional upon the plaintiffs' entitlement to a due diligence audit report and the approval of the foreign investment committee to be obtained by the plaintiffs.

By a letter of offer dated 20 May 1997 the first plaintiff agreed to grant a short term loan of RM311,950 to the defendant and the defendant had accepted the offer on 24 May 1997 ('Loan I') by signing the acceptance on the said offer letter.

The purpose of Loan I was to assist the defendant to acquire a semi-detached double storey factory unit known as Lot 32 Juru Industrial Park. The issue document of title in respect of this property has been issued under Title No HS (M) 1367 No Lot 3640 Mukim 13, Seberang Perai Tengah, Pulau Pinang ('the Seberang Perai property').

The pertinent terms relating to the granting of Loan I were:

(a) That the defendant will pay interest at the rate of 1% above the base lending rate of Malayan Banking Bhd on Loan I;

(b) That the defendant will pay management fee of 1.5% per annum on Loan I;

(c) That the defendant will repay Loan I together with interest and fee to the first plaintiff upon receipt of its proceeds from the defendant's proposed asset divestment; and

(d) That the defendant will pledge the title 'the Seberang Perai Property' to the first plaintiff as collateral.

The monies were then remitted by the second plaintiff to the account of the defendant by instructing their bank to transfer the said sums to the defendant's account.

By another letter of offer dated 11 June 1997, the first plaintiff agreed to grant a short term loan of RM300,000 to the defendant and the defendant had accepted the offer on 11 June 1997 ('Loan II') by signing the acceptance on the said letter of offer.

The purpose of Loan II was to assist the defendant to acquire two acres of industrial land with two built-up warehouses in Sungai Petani. The issue document of title in respect of these properties have been issued under Title No PT 18867 HS (D) 89/92, Lot 42 Mukim Sungai Petani, Kuala Muda, Kedah and PT 18868 HS (D) 90/92, Lot 43 Mukim Sungai Petani, Kuala Muda, Kedah ('the Sungai Petani Properties').

The pertinent terms relating to the granting of Loan II were:

(a) That the defendant will pay interest at the rate of 1% above the base lending rate of Malayan Banking Bhd on Loan II;

(b) That the defendant will pay management fee of 1.5% per annum on Loan II;

(c) That the defendant will repay Loan II together with interest and fee to the first plaintiff upon receipt of its proceeds from the defendant's proposed asset divestment; and

(d) That the defendant will pledge the title to the Sungai Petani Properties to the second plaintiff as collateral.

A portion of Loan II totalling RM140,000 was then remitted by the second plaintiff to the account of the defendant by instructing their bank to transfer the said sum to the defendant's account.

The original titles for the Seberang Perai Property and the Sungai Petani Properties were never delivered to the first plaintiff and the second plaintiff respectively.

A letter of demand dated 2 November 1998 was sent to the defendant by the solicitors for the plaintiffs. Since no response was forthcoming from the defendant the plaintiffs instituted these proceedings.

The claim

This is an application by both the plaintiffs for an order:

(1) That the defendant do deliver the original issue documents of title relating to the Seberang Perai Property and the Sungai Petani Properties to the first plaintiff within 10 days from the date of this order and that the said first plaintiff do retain the said titles until full settlement of Loan I and Loan II together with the agreed interest as contained in the letters of offer dated 20 May 1997 and 11 June 1997.

(2) Alternatively, for an order that if the Seberang Perai Property and the Sungai Petani Properties have not been registered in the name of the

defendant, the said documents of title relating to the said properties together with the duly completed and stamped memorandum of transfer and all other documents duly signed and which are necessary to effect the transfer of the said properties into the name of the first plaintiff, be delivered to the first or the second plaintiff by the defendant or its servant or agent within 10 days of this order.

The defence

The defence is two pronged. Firstly, the defendant contends that the said Loans I and II contravene the Moneylenders Act 1951 ('the Act') and are thus illegal and therefore unenforceable.

Secondly, that the defendant is not in possession of the issue documents of title to the Sungai Petani Properties and accordingly is not in a position to deliver up the same to the plaintiffs.

Findings of the court

The Moneylenders Act 1951 ('the Act')

It is the case of the defendant that although the first plaintiff has no licence issued under the Act, the first plaintiff has indeed acted as a moneylender as defined under the Act by charging interest at 1.5% per annum on the two loans. Besides these two loans the defendant contends that the first plaintiff has also granted the defendant another loan which forms the subject matter of another suit filed in the Kuala Lumpur High Court by way of D5-22-3025-98 ('the D5 suit'). It is necessary to reproduce the relevant provisions of the Act which revolve around this case.

Section 2:

> Interpretation
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> In this Act, unless the context otherwise requires —
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> ...
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> 'moneylender' includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent.

Section 3:

> Certain persons and firms presumed to be moneylenders
>
> Save as excepted in s 2A(1) and (2), any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender.

The plaintiff contends that since it is an investment holding company and does not involve itself in the business of moneylending, the presumption raised by s 3 of the Act does not arise. Relying on the words 'until the

contrary be proved', the plaintiffs rightly contend that the presumption raised by s 3 is indeed a rebuttable presumption. The defendant on the other hand contends that the first plaintiff is a moneylender as it has on three separate occasions lent money to the defendant in consideration of a larger sum to be paid. The defendant pointed out that in *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] MLJ 74 (PC), the Privy Council had said at p 77 as follows:

> ... Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort to amount to a carrying on of business.

Whilst still on this case it is pertinent that I cite a passage also from Lord Devlin and also found at p 77. His Lordship said:

> ... In order to prove that a man is a money-lender within the meaning of the ordinance, it is necessary to show some degree of system and continuity in his money-lending transactions.

It is therefore relevant to look at the facts of the case.

The first plaintiff has held itself out to be an investment holding company. This by itself does not make the first plaintiff a moneylender. The first plaintiff has also stated that it had never given any loans to anybody else except the defendant. I also note that all the 3 loans given were for similar purposes and within a close proximity of time, within a ten-month period. On these grounds alone I am satisfied that the first plaintiff was not involved in the business of moneylending. There certainly is no question of any continuity or system or repetition of similar loans to any other person that can lead to the conclusion that the first plaintiff is in the moneylending business. I respectfully agree and indeed am bound by the decision of the Federal Court in *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9 where, having reviewed the decision in *Chow Yoong Hong* and other cases Salleh Abas FJ (as he then was) said at p 12:

> ... The principle established by all these decisions, we respectfully agree, is that the question whether a person is a moneylender or not is one of fact and that our task is to see whether the primary or principal object of his business as distinguished from incidental parts of his business is one of moneylending.

I find that in this case the loans were indeed given for a genuine purpose. The first plaintiff had entered into a sale and purchase transaction to purchase a total of 70% of the shares in the defendant and had paid a deposit of RM9.5m to purchase the said shares. This is not a small sum of money. The first plaintiff had committed itself to purchase an interest in the defendant and I find that it is not at all unreasonable for the plaintiffs to ensure the financial well-being of the defendant. Taking the cue from *Ngui Mui Khin*, it is my judgment that these three loans were merely incidental to the sale and purchase transaction of the said shares in the defendant by the first plaintiff.

The Sungai Petani lands

The plaintiffs accept the defendant's submission that it is not in possession of the issue document of title to the Sungai Petani lands and that therefore the defendant is in no position to deliver up the same to the plaintiffs and thus have withdrawn their claim for delivery of the original issue document of title to the Sungai Petani lands.

Since the plaintiffs have made a land search over the Seberang Perai property and have ascertained that the said property is still in the name of the developer and that it has yet to be transferred into the name of the defendant the plaintiffs are only confining their claim to the alternative prayer and only in respect of the Seberang Perai property.

In the circumstances, therefore, I grant the alternative prayer of the plaintiffs in respect of only the Seberang Perai property. The plaintiffs will have their costs.

Order accordingly.

Reported by Benjamin Yong